

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

MERIAL LIMITED and MERIAL S.A.S

Plaintiffs,

v.

VELCERA, INC. and FIDOPHARM, INC.

Defendants.

Case No. 3:11-cv-00157-CDL

MERIAL'S NOTICE OF WITHDRAWAL OF EMERGENCY MOTION TO COMPEL

Plaintiffs Merial Limited and Merial S.A.S. (collectively, "Merial") respectfully withdraw their Emergency Motion to Compel the Production of Documents and Things (Dkt. 38, the "Motion to Compel") from Defendants Velcera, Inc. and FidoPharm, Inc. (collectively, "Velcera"). Notwithstanding Merial's withdrawal of its Motion to Compel, Merial briefly addresses the statements made in Velcera's response brief (Dkt. 49).

RESPONSE

Velcera significantly mischaracterizes the events leading up to, and which ultimately necessitated, Merial's Motion to Compel. At the time Merial's Motion to Compel was filed, Merial had, without question, fulfilled its "meet and confer" obligations concerning Velcera's failure to produce any documents in response to Merial's document requests. Prior to Merial's filing, Merial had met and conferred with Velcera on several occasions¹ concerning the facts

¹ As noted in Merial's Motion to Compel, telephone conferences were held between lead counsel for Merial, Frank Smith, and lead counsel for Velcera, Joseph Wargo, on March 2 and March 12 to discuss this issue.

that (i) Velcera had not produced a single document in response to Merial’s discovery requests, which had been served on the first day of discovery in this case, January 20, 2012, and (ii) the impact that Velcera’s delay in producing documents, in particular its financial records, was having on Merial’s ability to submit its expert report on damages by the deadline for submitting that report. Velcera cites to no authority – and of course none exists – that Merial should have been required to continue to meet and confer, indefinitely, on the issue of Velcera’s then-nonexistent document production. Notwithstanding Velcera’s protestations, Velcera’s March 19 letter (attached as Exhibit A to Merial’s Motion to Compel), which raised certain perceived deficiencies in *Merial’s* responses to *Velcera’s* discovery requests does nothing to obviate the fact that Merial had more than amply met and conferred on the issues raised in Merial’s Motion to Compel.

Velcera also states that Merial’s Motion to Compel was “never an ‘emergency.’” (Dkt. 49, Velcera’s Resp. Brief at 1). Velcera conveniently omits from its response brief the critical fact that when Merial filed its Motion the deadline for the parties’ burden of proof expert reports was April 12, 2012. Merial required Velcera’s documents, particularly its financial documents, in order to depose Velcera’s corporate designee on damages issues sufficiently in advance of that deadline so that Merial’s damages expert could review and rely on the deposition testimony in preparing his report. Velcera, however, did not produce any documents until March 27, none of which were substantive financial documents. Velcera did not produce any of the substantive financial documents required by Merial’s experts until March 30, when it produced only *one* two-page summary financial document. Velcera did not complete its production of financial documents until the end of the day on April 13, 2012, the same date it filed its response to Merial’s Motion to Compel, which was only two-business days before the scheduled deposition

of Velcera's corporate designee on financial issues.² Considering that Merial needed time to review the documents that would eventually be produced by Velcera, discuss those documents with its experts, prepare for and take the deposition of Velcera's corporate designee on financial issues, and have Merial's experts prepare a report, Merial in good faith believed – and continues to believe – that the situation with which it was faced on March 21, 2012 most certainly constituted an emergency.

WITHDRAWAL OF MOTION

Notwithstanding the above, and, notwithstanding that it was Velcera's delays in producing its documents that necessitated Merial incurring the burden and expense of having to file its motion, in consideration of the fact that Velcera has now represented to Merial, and to the Court, that it has made its "final production" of documents³ (Resp. Br. at 3), Merial hereby respectfully withdraws its Motion to Compel.

² On March 27, 2012, Velcera stated that it would not be able to produce a witness to testify on the financial issues in the case prior to the April 12, 2012 deadline. Accordingly, on March 29, 2012, Merial filed a consent motion to extend deadlines to submit expert reports (Dkt. 45), which the Court granted on March 30, 2012.

³ Velcera has qualified this statement, indicating that though Velcera has now completed its production of its financial documents, Velcera has not yet produced all of its responsive e-mails and other electronically stored information.

Respectfully submitted, this 27th day of April, 2012.

/s/ Jason D. Rosenberg

Judy Jarecki-Black, Ph.D., Esq.
(judy.jarecki@merial.com)
Georgia Bar No. 801698
MERIAL LIMITED
3239 Satellite Blvd.
Duluth, Georgia 30096-4640
Tel.: (678) 638-3805
Fax: (678) 638-3350

J. Patrick Elsevier, Ph. D., Esq.
(jpelsevier@jonesday.com)
Georgia Bar No. 246694
JONES DAY
12265 El Camino Real
Suite 200
San Diego, California 92130-4096
Tel.: (858) 314-1200
Fax.: (858) 314-1150

Edward D. Tolley, Esq.
(etolley@mindspring.com)
Georgia Bar No. 714300
COOK NOELL TOLLEY & BATES LLP
304 East Washington Street
P.O. Box 1927
Athens, GA 30603-1927
Tel.: (706) 549-6111
Fax: (706) 548-0956

Frank G. Smith, III, Esq.
(frank.smith@alston.com)
Georgia Bar No. 657550
Jason D. Rosenberg, Esq.
(Jason.rosenberg@alston.com)
Georgia Bar No. 510855
Matthew W. Howell, Esq.
(matthew.howell@alston.com)
Georgia Bar No. 607080
Nadya M. Sand, Esq.
Georgia Bar No. 156051
(nadya.sand@alston.com)
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
Tel.: (404) 881-7000
Fax: (404) 881-7777

Counsel for Plaintiffs Merial Limited and Merial SAS

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CERTIFICATE OF SERVICE

I hereby certify that I have this date filed the foregoing MERIAL'S NOTICE OF WITHDRAWAL OF EMERGENCY MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND THINGS, via the Court's CM/ECF system, which will automatically give notice to all counsel of record.

This 27th day of April, 2012.

/s/ Nadya M. Sand _____
Nadya M. Sand